

# Rules and Regulations

Federal Register

Vol. 74, No. 20

Monday, February 2, 2009

This section of the FEDERAL REGISTER contains regulatory documents having general applicability and legal effect, most of which are keyed to and codified in the Code of Federal Regulations, which is published under 50 titles pursuant to 44 U.S.C. 1510.

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## NUCLEAR REGULATORY COMMISSION

### 10 CFR Chapter I

[NRC-2006-0011]

RIN 3150-AH84

#### Notification of Impending Waiver Termination

**AGENCY:** Nuclear Regulatory Commission.

**ACTION:** Notice of impending waiver termination.

**SUMMARY:** Section 651(e) of the Energy Policy Act of 2005 (EPAAct) authorized the U.S. Nuclear Regulatory Commission (Commission or NRC) to issue a time-limited waiver (70 FR 51581; August 31, 2005) to allow continued use and possession of naturally-occurring and accelerator-produced radioactive materials (NARM) while the Commission developed a regulatory framework for regulation of the new byproduct material. The Commission has begun terminating the time-limited waiver in phases in accordance to the provisions of the "Plan for the Transition of Regulatory Authority Resulting from the Expanded Definition of Byproduct Material" (transition plan) issued by the Commission on October 19, 2007 (72 FR 59157). The first phase of waiver terminations occurred on November 30, 2007 (72 FR 68043), and the second phase occurred on September 30, 2008 (73 FR 14376).

This document provides advance notification that on August 7, 2009, the Commission will terminate the time-limited waivers for all remaining non-Agreement States and Canadian licenses that are under NRC jurisdiction.

Alaska, Connecticut, Hawaii, Michigan, New Jersey, and Virginia.

As provided in the transition plan, for existing NRC licensees, NARM use

amendments are required within 6 months from the date of waiver termination. For NARM users in non-Agreement States and Canadian licensees without a NRC license, the license applications are required within 12 months from the date waiver termination.

**FOR FURTHER INFORMATION CONTACT:**

Shirley Xu, Office of Federal and State Materials and Environmental Management Programs, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001, telephone (301) 415-7640 or e-mail [Shirley.xu@nrc.gov](mailto:Shirley.xu@nrc.gov).

Dated at Rockville, Maryland, this 26th day of January 2009.

For the Nuclear Regulatory Commission.

**Annette L. Vietti-Cook,**

*Secretary of the Commission.*

[FR Doc. E9-2179 Filed 1-30-09; 8:45 am]

**BILLING CODE 7590-01-P**

## FEDERAL DEPOSIT INSURANCE CORPORATION

### 12 CFR Part 360

RIN 3064-AD26

#### Processing of Deposit Accounts in the Event of an Insured Depository Institution Failure

**AGENCY:** Federal Deposit Insurance Corporation (FDIC).

**ACTION:** Final rule.

**SUMMARY:** The FDIC is adopting a final rule establishing the FDIC's practices for determining deposit and other liability account balances at a failed insured depository institution. Except as noted, the FDIC practices defined in the final rule represent a continuation of long-standing FDIC procedures in processing such balances at a failed depository institution. The final rule also imposes certain disclosure requirements in connection with sweep accounts. The final rule replaces the FDIC's interim rule on this subject and applies to all insured depository institutions.

**DATES:** *Effective Dates:* The final rule is effective March 4, 2009.

**FOR FURTHER INFORMATION CONTACT:**

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**SUPPLEMENTARY INFORMATION:**

#### I. Background

Upon the failure of an FDIC-insured depository institution, the FDIC must determine the total insured amount for each depositor. 12 U.S.C. 1821(f). To make this determination, the FDIC must ascertain the balances of all deposit accounts owned by the same depositor in the same ownership capacity at a failed institution as of the day of failure.

A deposit account balance can be affected by transactions<sup>1</sup> presented during the day. A customer, a third party or the depository institution can initiate a deposit account transaction. All depository institutions process and post these deposit account transactions according to a predetermined set of rules to determine whether to include a deposit account transaction either in that day's end-of-day ledger balances or in a subsequent day's balances. These rules establish cutoff times that vary by institution and by type of deposit account transaction—for example, check clearing, Fedwire, ATM, and teller transactions. Institutions post transactions initiated before the respective cutoff time as part of that day's business and generally post transactions initiated after the cutoff time the following business day. Further, institutions automatically execute prearranged "sweep" instructions affecting deposit and other liability balances at various points throughout the day. The cutoff rules for posting deposit account transactions and the prearranged automated instructions define the end-of-day balance for each deposit account on any given business day.<sup>2</sup>

In the past, the FDIC usually took over an institution as receiver after it had closed on a Friday. For institutions with

<sup>1</sup> A deposit account transaction, such as deposits, withdrawals, transfers and payments, causes funds to be debited from or credited to the account.

<sup>2</sup> Some depository institutions operate "real-time" deposit systems in which some deposit account transactions are posted throughout the business day. Most depository institutions, however, process at least some deposit account transactions in a "batch mode," where deposit account transactions presented before the cutoff time are posted that evening or in the early morning hours of the following day. With either system—batch or real-time—the institution calculates a close-of-business deposit balance for each deposit account on each business day.

a few branches in one state, deposit account transactions for the day were completed and determining account balances on that day was relatively straightforward. The growth of interstate banking and branching over the past two decades and the increasing complexity of bank products and practices (such as sweep accounts) has made the determination of end-of-day account balances on the day of closing much more complicated.

In July 2008, the FDIC issued an interim rule on the "Processing of Deposit Accounts in the Event of an Insured Depository Institution Failure" ("interim rule").<sup>3</sup> Generally, the interim rule established practices for determining deposit and other liability account balances at a failed insured depository institution. Concurrent with the adoption of the interim rule, the FDIC issued a related final rule requiring the largest insured depository institutions to adopt mechanisms that would, in the event of the institution's failure: Provide the FDIC with standard deposit account and other customer information; and allow the FDIC, as receiver, to place and release holds on liability accounts, including deposits ("Large Bank Modernization Rule").<sup>4</sup>

The comment period on the interim rule ended on September 15, 2008. We received four comments on the interim rule. The comments are summarized below and may be viewed in their entirety on the FDIC's Web site at <http://www.fdic.gov/regulations/laws/federal/2008/08comAD26.html>.<sup>5</sup>

## II. Summary of the Interim Rule

Since the final rule is essentially the same as the interim rule, the details of the interim rule are provided below in the discussion of the final rule. In

summary, the interim rule: (1) Articulated general principles underlying the FDIC's existing and future practices and procedures for determining account balances in the event of an insured depository institution failure; (2) identified and defined the end-of-day *ledger balance* of the deposit or other liability account as the account balance the FDIC will use to make deposit insurance determinations in institution failures; (3) provided that, in an institution failure, the FDIC will use *cutoff* rules previously applied by the institution in establishing the end-of-day ledger balances for deposit insurance determination purposes, but noted the possibility that, if necessary, the FDIC might establish an *FDIC Cutoff Point* coinciding with the point at which the FDIC, as receiver, acts to stop deposit transactions which might result in creating new liabilities or extinguishing existing liabilities; (4) indicated how uncollected deposited checks and swept funds will be treated, for deposit insurance purposes, at failed institutions; and (5) imposed requirements, effective July 1, 2009, that insured depository institutions inform their sweep account customers of the nature of their swept funds and how those funds would be treated if the institution should fail.

## III. Comments on the Interim Rule

As noted, the FDIC received four comments on the interim rule. Three of the comments were from banking industry trade associations and one was from a large commercial bank. The comments addressed the FDIC Cutoff Point, the treatment of swept funds and sweep account disclosures.

### *FDIC Cutoff Point*

Two industry trade association commenters expressed concern over the establishment and use of the FDIC Cutoff Point. One suggested an FDIC Cutoff Point should be rarely used "because it would create uncertainty and inconsistency in how accounts are handled in a bank failure. Each institution has different cutoff times depending on the type of transaction as well as geographic location. The associations instead support the proposed general approach for determining deposit account balances based on the closing ledger balances after the normal processes of the failed bank are completed for the day." The other trade association noted "its concern that establishing a single cut-off time is problematic for financial institutions. From a technological standpoint, most operational systems at

large banks are not capable of changing the current cutoff time limitations when immediately directed by the FDIC. Additionally, an arbitrary cutoff time may theoretically precede normal business days or intraday transfers by customers, particularly in reference to those accounts at international banks. Therefore, we once again *recommend* that the FDIC utilize the established cutoff times used by banks in their normal business hours."

### *Treatment of Swept Funds*

One industry trade association noted "there is continuing uncertainty as to how sweep accounts will be affected, and how swept funds would be treated in a bank failure. Bankers find the term 'swept funds' unclear, especially when applied to non-automated transactions. It would therefore be useful for the FDIC to clarify the intended scope of its regulation, including whether it is meant to apply to funds transferred outside the books of a bank."

### *Sweep Account Disclosure*

All three industry trade associations agreed with the FDIC's intent to provide clear disclosure to sweep account customers. One association noted, however, that "all of the bankers we consulted on the proposal said that their sweep agreements currently detail for customers the sweep process, how funds are swept into specific investments, and that funds swept out of the bank are not FDIC-insured deposits. Thus, it is not clear what additional information would be provided as a result of an FDIC sweep disclosure requirement."

Two industry trade associations and the large bank argued that the disclosure requirement should not be overly prescriptive. These comment letters noted that sweep arrangements and their processes vary considerably across institutions and that specifically worded disclosures may be unsuitable when applied across the industry. One of the trade associations and the large bank argued that the FDIC should not dictate the specific language to be included in the disclosure. Alternatively, one trade association expressed mixed feelings indicating some of its members feel that a model disclosure form would be appropriate.

All of the commenters recommended a one-time disclosure to the customer, most preferably when the account is opened. They noted that periodic disclosures would be an unnecessary financial and regulatory burden on institutions offering sweep products. One trade association indicated "the FDIC should allow banks to provide

<sup>3</sup> 73 FR 41170 (July 17, 2008).

<sup>4</sup> 73 FR 41180 (July 17, 2008).

<sup>5</sup> Throughout this preamble the terms "deposit" (or "domestic deposit"), "foreign deposit" and "international banking facility deposit" identify liabilities having different meanings for deposit insurance purposes. A "deposit" is used as defined in section 3(l) of the Federal Deposit Insurance Act (12 U.S.C. 1813(l)) ("Section 3(l)"). A deposit includes only deposit liabilities payable in the United States, typically those deposits maintained in a domestic office of an insured depository institution. Only deposits meeting these criteria are eligible for insurance coverage. Insured depository institutions may maintain deposit liabilities in a foreign branch ("foreign deposits"), but these liabilities are not deposits in the statutory sense (for insurance or depositor preference purposes) for the time that they are payable solely at a foreign branch or branches. Insured depository institutions also may maintain liabilities in an international banking facility ("IBF"). An "international banking facility deposit," as defined by the Board of Governors of the Federal Reserve System in Regulation D (12 CFR 204.8(a)(2)), also is excluded from the definition of "deposit" in Section 3(l) and the depositor preference statute (12 U.S.C. 1821(d)(11)).

notice via several established means of communication, such as sweep contracts, client letters, transaction confirmation statements, and month-end statements. In addition, the final rule should clarify that banks will not be required to modify existing client contracts, which may have been negotiated years ago. This would allay banker concerns that changes in disclosure provisions will be expensive to implement and disruptive to sweep customer relationships.”

Several commenters indicated that the potential for using the FDIC Cutoff Point would complicate disclosure. Since the institution cannot determine when the FDIC Cutoff Point may be established in the event of failure, it would be difficult to explain to customers how their swept funds would be treated. Some commenters also wondered whether the possibility of provisional holds should be disclosed to sweep customers.

#### IV. The Final Rule

The final rule essentially is unchanged from the interim rule, except that the preamble and the regulatory text provide examples of sweep accounts subject to the final rule and explain how the FDIC will treat each of those sweep arrangements in the event of an institution failure. The final rule also clarifies how the FDIC will treat repo sweeps in the event of an institution failure and slightly modifies the disclosure requirements for sweep products. The following is an explanation of the final rule.

##### *Underlying Principles*

The final rule describes the method for determining the value and nature of claims against a failed insured depository institution to be used in the event of failure. Upon taking control of a failed insured depository institution the receiver must construct an ending balance sheet for the depository institution (which becomes the beginning balance sheet for the receivership) and determine the value and nature of the claims against the failed institution, including claims to be made by depositors, general creditors, subordinated creditors, and shareholders. Those claims determinations will be made consistent with the principles described below, which are unchanged from the principles articulated in the interim rule and, for the most part, reflect existing FDIC practices and procedures used to determine account balances at institution failures.

- In making deposit insurance determinations and in determining the value and nature of claims against the

receivership on the institution's date of failure the FDIC, as insurer and receiver, will treat deposits and other liabilities of the failed institution according to the ownership and nature of the underlying obligations based on end-of-day ledger balances for each account using, except as expressly provided otherwise in the final rule, the depository institution's normal posting procedures.

- In its role as receiver of a failed insured depository institution, in order to ensure the proper distribution of the failed institution's assets under the FDI Act (12 U.S.C. 1821(d)(11)) as of the FDIC Cutoff Point, the FDIC will use its best efforts to take all steps necessary to stop the generation, via transactions or transfers coming from or going outside the institution, of new liabilities or extinguishing existing liabilities for the depository institution.<sup>6</sup>

- End-of-day ledger balances are subject to corrections for posted transactions that are inconsistent with the above principles.

##### *End-of-Day Ledger Balances and Cutoff Points*

As in the interim rule, in the final rule the deposit or liability account balance used for deposit insurance determination purposes is defined as the end-of-day *ledger* balance of the deposit or other liability on the day of failure. Except as noted, the FDIC will use the cutoff rules previously applied by the failed insured depository institution in establishing the end-of-day ledger balance for deposit insurance determination purposes. However, as under the interim rule, the final rule allows the FDIC to establish an FDIC Cutoff Point, coinciding with the point in time at which the receiver acts to stop deposit transactions which might result in creating new liabilities or extinguishing existing liabilities resulting from external transactions. The FDIC Cutoff Point will facilitate the orderly winding up of the institution and the FDIC's final determination of

the ledger balances of the deposit accounts.

The FDIC's intention is to complete internal postings of transactions presented or authorized prior to the institution's normal cutoff rules or the FDIC Cutoff Point, as applicable, according to the depository institution's normal procedures—thus, as explained below, the nature of the liability may change after the FDIC Cutoff Point. Any transaction—including sweep arrangements—would be completed for that day according to normal procedures if it involves only the movement of funds between accounts within the confines of the depository institution. Some sweep arrangements shift funds within the depository institution from a deposit account to ownership in a sweep investment vehicle. The value and nature of these claims will be determined as they rest on the books and records of the depository institution as reflected in its end-of-day ledger balances.

If the institution's ordinary cutoff time for the day's business on the day of failure for *any particular kind of transaction* precedes the FDIC Cutoff Point, the institution's ordinary cutoff time will be used. Where the institution's ordinary cutoff time for an individual kind of transaction is later than the FDIC Cutoff Point, the institution's cutoff time will be replaced by the FDIC Cutoff Point. The “Applicable Cutoff Time” used for any kind of transaction, thus, will be the earlier of the institution's ordinary cutoff time or the FDIC Cutoff Point. Different kinds of transactions may have different Applicable Cutoff Times. Transactions occurring after the Applicable Cutoff Time will be posted as a subsequent day's business, if the operations of the failed institution are carried on by a successor institution or by the FDIC as receiver or insurer.

As under the interim rule, in a depository institution failure where deposit operations are not continued by a successor institution, account transactions on the day of failure also will be posted to the applicable accounts as described above. Since there is no next business day in this case, rather than posting transactions occurring after the Applicable Cutoff Time as the next day's business, such transactions will be handled depending on the nature of the transaction. In the case of a cash or other deposit occurring after the Applicable Cutoff Time, such funds—which would *not* be included in the end-of-day ledger balance used for claims purposes—would be disbursed to the account owner. If a cash or other withdrawal is made after the Applicable

<sup>6</sup>This principle draws a sharp distinction between transactions involving the transfer of funds into or out of the failed institution and transactions intended to move funds between accounts or otherwise on the books and records of the failed institution. The receiver will act to stop the inflow and outflow of cash/assets at the point at which it takes control of the failed institution; thus, transactions involving the transfer of assets into or out of the failed institution may be blocked or suspended. Transactions internal to the failed institution's operations initiated prior to the FDIC Cutoff Point—including those initiated through prearranged automated instructions—will still be conducted after the point of failure as part of a necessary process to arrive at the end-of-day ledger balances and to establish the nature of the claim recognized by the receiver.

Cutoff Time, such funds—again which would *not* be included in the end-of-day ledger balance used for claims purposes—could be used by the receiver to satisfy a claim against the receivership.<sup>7</sup>

Like the interim rule, the final rule does not establish any new operational requirements for insured institutions relative to the FDIC Cutoff Point. Also, the final rule explicitly authorizes the FDIC, as receiver, to correct errors and omissions after the day of failure and reflect them in the end-of-day ledger balances.

In response to the comments on this issue, FDIC reiterates that the final rule imposes no requirements on institutions to establish mechanisms or in any way prepare for the possibility that the FDIC would use its own FDIC Cutoff Point if the institution should fail. The FDIC emphasizes that it will apply the institution's normal cutoff times in most cases, but establishing an FDIC Cutoff Point may be essential to efficiently produce end-of-day ledger balances in some situations. Strictly applying a depository institution's pre-established cutoff times in all circumstances is inconsistent with the duties and responsibilities of the receiver—as articulated in one of the principles, specifically in the event of failure the receiver will take control of the failed institution and simultaneously will act to stop deposit or other transactions involving creating new liabilities or extinguishing existing liabilities. In many cases, this can be done consistent with the institution's normal cutoff times, but in others it cannot and the FDIC will establish an FDIC Cutoff Point. If the receiver is successful in stopping these external transactions after it takes control, there will be no new transactions to be posted affected by an FDIC Cutoff Point. In this case, the end-of-day ledger balances on the day of failure will be calculated using the failed institution's pre-established cutoff points. If the receiver is unsuccessful in stopping the external transactions, the FDIC Cutoff Point establishes a basis for posting these transactions the following day, if that is the course of action selected by the receiver.

#### *Treatment of Uncollected Deposited Checks*

As with the interim rule, under the final rule, in determining deposit

account balances at a failed insured depository institution, the FDIC will deem all checks deposited into and posted to a deposit account by the Applicable Cutoff Time as part of the end-of-day ledger balance for insurance purposes. This treatment of uncollected deposited checks is warranted because: Depository institutions use and calculate the ledger balance in a more consistent way than other balances; it is consistent with the way that depository institutions report deposits on Call Reports and Thrift Financial Reports; it is the balance the FDIC uses to determine an institution's assessment base for calculating the institution's deposit insurance assessments;<sup>8</sup> it is the easiest balance for depositors to understand; and it is the most frequently used balance on financial statements provided to customers. Using ledger balances also is consistent with the definition of a deposit in the Federal Deposit Insurance Act ("FDI Act"), which includes balances both "conditionally" or "unconditionally" credited to a deposit account. 12 U.S.C. 1813(l).

Further, especially in a large depository institution failure, using end-of-day ledger balances may be the only operationally feasible means for the FDIC to make deposit insurance determinations timely and expeditiously. As discussed in more detail in the Large Bank Modernization Rule, the FDIC is statutorily obligated to pay insured deposits "as soon as possible" after an insured depository institution fails. 12 U.S.C. 1821(f)(1). The FDIC places a high priority on providing access to insured deposits promptly and, in the past, has usually been able to allow most depositors access to their deposits on the business day following closing. The largest insured institutions today are much bigger than any institution has been in the past and are growing increasingly complex. Providing prompt access to depositors if one of these institutions were to fail would prove difficult if adjustments for uncollected funds were necessary.

<sup>8</sup> The FDIC's recent revisions to the FDIC's risk-based assessment system have made an institution's assessment base, which is used to determine its deposit insurance assessment, virtually identical with an institution's deposits as defined in the Federal Deposit Insurance Act. The revisions eliminated the "float" deductions previously used to compute an institution's assessment base; hence, deposits posted to a deposit account but not yet collected are now part of the assessment base. The stated rationale for eliminating the float deduction from the calculation of an institution's assessment base was that such deductions were small and decreasing as a result of legal, technological and system payment changes. 71 FR 69720 (Nov. 30, 2006).

#### *Sweep Accounts and Their Treatment in the Event of an Institution Failure*

A sweep account covered by the final rule involves the pre-arranged transfer of funds from a deposit account to: (1) An investment vehicle located *outside* the depository institution, or (2) another account or investment vehicle located *within* the depository institution. The pre-arranged transfer of funds out of the deposit account typically occurs prior to the establishment of the depository institution's normal end-of-day balances for the deposit account. Such arrangements also may call for a return of the transferred funds to the deposit account the following business day in a cycle that repeats itself daily.

After funds are swept from the originating deposit account, the sweep process may involve one or more intermediate transfer steps before the funds arrive at their final destination on any given business day, as reflected in the depository institution's end-of-day balances. Consistent with the general principles identified in the final rule (and discussed above), the FDIC will make its claims determinations based on deposit and other account balances reflected on the books and records of the depository institution after all normal end-of-day processing has been completed.

In making claims determinations on funds swept from a deposit account, yet still residing *within* the depository institution at the institution's normal end-of-day, the FDIC will use the following guidelines:

- Ownership of the funds and the nature of the claim will be based on records established and maintained by the depository institution for that specific account or investment vehicle.
- Depositor owned funds residing in a general ledger account as of the institution's end-of-day will be treated as a deposit for insurance purposes. Further, in calculating deposit insurance, these funds will be aggregated with the balance in the deposit account from which they originally were swept if their ownership interest has not changed. If there has been a change in ownership, the funds will be aggregated with the transaction deposit account balances of the new owner.
- The full amount of swept funds attributable to an individual customer residing in an omnibus or other commingled account as of the depository institution's normal end-of-day will be treated as belonging to that customer, regardless of any netting practices established by the depository institution.

<sup>7</sup> A deposit account withdrawal in the form of an official check drawn on the failed depository institution would not be used by the receiver to satisfy the insured deposit claim. Official items are considered to be deposits for deposit insurance purposes; therefore, such official withdrawals would be treated differently from cash withdrawals.

In the case of sweeps out of the depository institution into deposits or investment vehicles *not residing* on the books of the depository institution, in the event of failure the swept funds also will be treated consistent with their status in the end-of-day ledger balances of the depository institution and the external entity. If an expected transfer to the external sweep investment vehicle is not completed prior to the FDIC Cutoff Point, coinciding with the time the FDIC as receiver takes control of the failed institution, the external investment will not be purchased and the funds will remain in the account identified on the end-of-day ledger balance.

Most sweep arrangements involve a transactional deposit account. Under the final rule, the FDIC will treat deposits and other liabilities of the failed institution according to the ownership and nature of the underlying obligations based on end-of-day ledger balances for each account using the depository institution's normal posting procedures, except that, in its role as receiver of a failed insured depository institution, the FDIC will use its best efforts to take all steps necessary to stop the generation, via transactions or transfers coming from or going outside the institution, of new liabilities or extinguishing existing liabilities for the depository institution. In other words, at the point the FDIC as receiver takes control of the failed institution, it will use its best efforts to stop funds from flowing into or out of the depository institution (e.g., blocking wire transactions). The final rule does not require a depository institution to adjust its systems, policies or procedures to accommodate the receiver's responsibility in this regard.

If, after taking control of the failed depository institution, the receiver is successful in stopping funds from flowing into or out of the depository institution, the end-of-day balances generated from the depository institution's normal posting processes will be used for insurance purposes. Only if the receiver cannot stop funds from flowing into or out of the depository institution will adjustments be necessary. Thus, the treatment of swept funds may vary from the depository institution's normal end-of-day balances if the receiver cannot stop all funds from flowing into or out of the depository institution.

The following is a discussion of how, under the final rule, the FDIC will treat funds associated with various sweep products in the event of failure.

*Deposit-to-deposit sweeps.* A deposit-to-deposit sweep moves funds between two deposit accounts within the same insured depository institution ("internal

sweep"). Deposit-to-deposit sweeps include "zero balance accounts" ("ZBAs") where funds are moved between a master demand deposit account ("parent") and various subsidiary demand deposit accounts ("child"), typically leaving a zero balance in the subsidiary accounts at the institution's end-of-day. ZBAs allow a customer to have multiple demand deposit accounts, each with a different business purpose, while permitting an automatic movement of funds between accounts necessary to fund deposit transactions. Under the final rule, the FDIC will treat for insurance purposes each account as it is determined at the institution's normal end-of-day for each account. Since ZBA arrangements typically call for all child accounts to have a zero balance at the institution's end-of-day, then all child accounts associated with a ZBA will have been reduced to zero with all of the customer's funds residing in the parent account.

Many depository institutions have established "retail sweep" or "reserve sweep" products where a single account is divided into two sub-accounts—a transaction account and a money market deposit account ("MMDA"). Retail sweep accounts are established for the purpose of lowering required reserves. The amount and frequency of sweeps are determined by the depository institution using an algorithm designed to minimize required reserves yet still honor the limit of six transactions per month imposed on MMDAs. The customer may be unaware that this sweep mechanism is in place, as it may not be indicated in the original account agreement signed by the customer. For statement purposes the customer sees all deposit balances as being in the transaction account; the MMDA is not indicated. Under the final rule a sweep account involves the pre-arranged transfer of funds from a deposit account to another account or investment vehicle. In the case of retail or reserve sweep accounts only a single deposit account has been established; thus, under the final rule retail or reserve sweep arrangements would not be treated as a sweep account, rather as a single account as viewed by the customer.

An alternative arrangement with a single account, also not considered to be a sweep product under the final rule, involves a MMDA with a linked NOW account (sub-account). The customer only is aware of the MMDA, as all funds reported on statements are listed as MMDA balances. Any transactions presented against this account are cleared using the NOW sub-account.

The depository institution uses an algorithm for transferring funds from the MMDA to the NOW sub-account to ensure the NOW sub-account has the necessary funds to clear transactions yet honor the limit of six monthly transactions from the MMDA.

*Eurodollar and IBF sweep accounts.* Eurodollar and IBF accounts also are two examples of internal sweep investment vehicles. As indicated in the account agreement, funds in the deposit account above a specified threshold are swept into the Eurodollar or IBF account owned by the same customer. Thus, at the end of the business day, the customer's funds in excess of the pre-established threshold are reported as residing in a Eurodollar account (typically associated with the institution's branch in the Cayman Islands or Bahamas) or an IBF account. At the start of the next business day, the depository institution will sweep the balance back into the domestic deposit account. The cycle typically repeats itself daily.

In the case of Eurodollar and IBF sweep accounts the FDIC will, for insurance purposes, use deposit and account balances as they are reflected as of the institution's normal end-of-day. Thus, funds remaining in the domestic deposit account (below the pre-established threshold) will be treated as a deposit for insurance purposes. Funds that have been swept into the Eurodollar or IBF account, as reflected on the institution's end-of-day records, will be treated as unsecured general creditor claims against the receivership. Usually the underlying contract for a Eurodollar sweep specifies that the obligation at the foreign branch is not payable in the United States and, hence, is not a *deposit*,<sup>9</sup> for deposit insurance and depositor preference purposes. Upon an institution's failure, amounts in a Eurodollar account in a foreign branch of the failed institution are treated as unsecured, non-deposit liabilities and are not eligible for insurance or depositor preference status. The same treatment will apply to sweeps to IBFs, which by statutory definition are not

<sup>9</sup> The definition of "deposit" in the FDI Act expressly excludes: "any obligation of a depository institution which is carried on the books and records of an office of such bank or savings association located outside of any State, unless (i) such obligation would be a deposit if it were carried on the books and records of the depository institution, and would be payable at an office located in any State; and (ii) the contract evidencing the obligation provides by express terms, and not by implication, for payment at an office of the depository institution located in any State." 12 U.S.C. 1813(l)(5)(A). Also, the FDI Act defines IBF obligations as non-deposits, which are not eligible for deposit insurance or depositor preference status. 12 U.S.C. 1813(l)(5)(B).

deposits. Eurodollar and IBF account holders will thus be accorded general creditor status in the receivership estate.

*Repo sweep accounts.* Repo sweep arrangements typically are conducted via internal transfers on the institution's books. As with Eurodollar and IBF sweep accounts, repo sweep arrangements move funds out of a deposit account as of the depository institution's end-of-day. The swept funds could be processed differently depending on the institution's particular sweep mechanism.

In a properly executed repo sweep arrangement, as of the depository institution's normal end-of-day, the sweep customer either becomes the legal owner of identified assets (typically government securities) subject to a repurchase agreement or obtains a perfected security interest in those assets. In such cases, where the sweep customer either owns or possesses a perfected security interest in the identified securities, upon an institution failure, the FDIC will recognize the customer's ownership or security interest in the securities. If the value of the securities at least equals the dollar amount of funds swept from the customer's account, the customer's swept funds will be fully protected in the event of failure. After failure, the disposition of the swept funds invested in securities will depend on the nature of the transaction structured by the FDIC. In a purchase and assumption transaction, the securities and the underlying repo arrangement will be transferred to an acquiring institution, which could include a bridge institution. Under this transaction structure, the funds normally would be swept back into the customer's deposit account on the business day following failure, thus giving the customer full access to these funds at that point. In a payoff of insured deposits, the customer would receive a check or other payment from the FDIC to reacquire the customer's interest in the securities according to the FDIC normal procedures.

The FDIC has observed that some institutions' repo arrangements are not properly executed. In those situations, the sweep customer obtains neither an ownership interest nor a perfected security interest in the applicable securities. A common example is where a customer's swept funds rest (as of the institution's end-of-day) in an account in which a pool of securities are also transferred, but where the customer has neither an ownership interest or a perfected security interest in any identified security(ies). In such cases,

upon an institution failure, under the final rule the FDIC will treat the swept funds as if they had not left the deposit account from which they originated. The FDIC notes that, in cases where repo sweeps are improperly executed (so that the customer obtains neither an ownership interest or perfected security interest in the applicable securities), institutions should report the swept funds as deposits in their Call or Thrift Financial Reports, for assessment and other purposes.

*Money market mutual fund sweep accounts.* Money market mutual fund sweeps are structured in a variety of ways. In some cases the money market mutual fund shares are held directly in the name of the sweep account holder, but in other cases the money market mutual fund account is either in the name of the depository institution or in the name of the transfer agent for the mutual fund. Shares are sold or allocated to the individual sweep customer depending on the particulars of the sweep arrangement. Some money market mutual fund sweep arrangements result in a "same-day" purchase of fund shares while "next-day" sweeps delay the purchase of fund shares by the customer until the day following the investment decision. In some cases the depository institution will wire funds to the money market mutual fund in payment for shares purchased, while in other cases the money market mutual fund will maintain an account at the depository institution for the purpose of accepting new purchases. Under the final rule, the FDIC will treat funds swept to a money market mutual fund depending on whether it is a same-day or next-day sweep arrangement, and whether the money market mutual fund maintains an account at the depository institution used for share purchases. These different variations of money market fund sweep arrangements and the FDIC's treatment of them in the event of an institution failure are discussed below.

The first type of account is a *same-day* money market mutual fund sweep where the mutual fund does not maintain an account at the depository institution. The investment decision on funds to be swept from a customer's account typically is made in the early afternoon. Funds are wired to the money market mutual fund prior to a pre-established cutoff point that same afternoon, usually by 4 p.m. Most failed depository institutions are closed after 4 p.m. If this is the case, on the day of failure, funds associated with same-day money market mutual fund sweeps will already have been wired outside the

depository institution prior to the failure. In this case, the sweep transaction will be deemed as completed and the customer's deposit account will reflect the sweep before arriving at the end-of-day balance for that day. In a purchase and assumption transaction, the customer's deposit account associated with the sweep product normally would be transferred to the acquiring institution, which could include a bridge bank. Under this arrangement, the funds held with the money market mutual fund would be available to be swept back into the customer's deposit account on the business day following failure.<sup>10</sup> In a payoff the sweep customer will receive a check or other means of payment for the value of the ownership interest in the money market mutual fund.

For same-day money market mutual fund sweeps, the depository institution may be closed prior to completion of the transmission of funds to the money market mutual fund. In this case, the FDIC as receiver will use its best efforts to stop this transmission. If the transmission of funds is blocked, the sweep transaction will not be completed and the customer's deposit account will *not* reflect the sweep before arriving at the end-of-day balance for that day. In this case, for insurance purposes, the funds swept on the day of failure will be treated as if they had not left the originating deposit account.

The second type of arrangement is a *next-day* money market mutual fund sweep where the mutual fund does not maintain an account at the depository institution. The investment decision on funds to be swept from a customer's account typically is made after the day's transactions are posted against the deposit account, usually in the late evening or early the following morning. Funds above the pre-established threshold are swept from the deposit account into a temporary holding account, which could be an omnibus account, where they reside as of the institution's normal end-of-day. The transaction with the money market mutual fund to complete the purchase of shares is made the following business day, usually in the morning. For insurance purposes the FDIC will use end-of-day ledger balances on the day of failure. In this case, on the day of

<sup>10</sup> This assumes the assets of the money market mutual fund are sufficient to maintain a \$1.00 share price. If the value of the money market share price is compromised below \$1.00 the sweep customer's interests will reflect this loss in value. The customer is not eligible to file a claim against the receiver to recover the loss in value of the money market mutual fund shares as such shares are not part of the receivership estate.

failure, funds associated with next-day money market mutual fund sweeps for that day will not have left the depository institution, but will reside in the omnibus account. In this case, for insurance purposes, the funds swept on the day of failure will be treated as if they had not left the originating deposit account. Funds already residing in the money market mutual fund resulting from prior day sweeps will be treated as described above for fully completed same-day money market mutual fund sweeps.

Under the next-day sweep arrangement, on any given day the deposit account balance could fall below the pre-established threshold, thus triggering a sweep of funds from the money market mutual fund to the deposit account. In this case, prior to the depository institution's normal end-of-day, the deposit account will be credited for the shortfall below the pre-established threshold and the omnibus account used by the institution for this next-day money market mutual fund sweep product will receive an offsetting debit entry. As of the depository institution's normal end-of-day, the next-day money market mutual fund omnibus account will consist of a series of debit entries (reflecting instances where funds are to be moved from the money market mutual fund to a deposit account) and credit entries (where funds are to be moved from a deposit account to the money market mutual fund). For claims purposes, the FDIC will not net the debits and credit entries in the omnibus account. In effect, as discussed in the previous paragraph, the sweep transaction with the money market mutual fund will not have occurred as of the depository institution's end-of-day—and the FDIC will regard the funds as remaining in the money market mutual fund. Thus, the debit entry in the omnibus account will be used to offset the corresponding credit to the originating deposit account to determine account balances for insurance purposes.

A variation of the next-day money market mutual fund sweep does not involve the use of a temporary holding account such as an omnibus account. Under this structure the investment decision on funds to be swept from a customer's account still is made after the day's transactions are posted against the deposit account, but excess funds are not debited from the deposit account until the following morning, after end-of-day balances have been determined. Funds are wired to the money market mutual fund the following business day as well. For insurance purposes, the FDIC will use end-of-day ledger

balances on the day of failure. In this case, on the day of failure, funds associated with next-day money market mutual fund sweeps for that day will not have been removed from the deposit account; thus the sweep will not have occurred on the day of failure and all funds will reside in the deposit account. Funds already residing in the money market mutual fund resulting from prior day sweeps will be treated in the event of failure as described above for fully completed same-day money market mutual fund sweeps.

The third type of account is a money market mutual fund sweep where the mutual fund maintains an account with the depository institution for the purpose of accepting new share purchases. Under this arrangement funds swept out of a customer's deposit account are credited, either directly or through a series of intermediate transactions, to an account owned solely by the money market mutual fund. The structure does not require that funds be wired to the money market mutual fund in order to purchase new shares. The movement of funds from the customer's deposit account into another account at the depository institution, in this case one owned by the money market mutual fund, constitutes an internal deposit transaction. Accordingly, in the event of failure, the FDIC as receiver would process all internal transactions prior to arriving at end-of-day balances used for insurance purposes. If the depository institution's ownership records establish the money market mutual fund as the actual owner of the swept funds,<sup>11</sup> these sweep transactions would be deemed to be completed. In the event of failure the funds residing in the money market mutual fund would be treated as described earlier, depending on whether the FDIC engages in a purchase and assumption or payoff transaction to resolve the institution. If the depository institution's ownership records establish the depositors as the actual owners of the swept funds, such as if the money market mutual fund's account was established for the benefit of the sweep customers, then the swept funds would be deemed to be owned by the sweep customers. In this case, for insurance purposes, the funds swept on the day of failure will be treated as if they had not left the deposit account.

*Fed Funds sweep accounts.* A Fed Funds account is another example of an internal sweep investment vehicle. These sweep arrangements function similarly to a Eurodollar or IBF sweep.

Thus, at the end of the business day, the customer's funds in excess of the pre-established threshold are swept to a Fed Funds account, a liability of the depository institution. At the start of the next business day, the depository institution will sweep the balance back to the deposit account. The cycle typically repeats itself daily.

In the case of Fed Funds sweep accounts the FDIC will for insurance purposes use deposit and account balances as they are reflected as of the institution's normal end-of-day. Thus, funds remaining in the domestic deposit account (below the pre-established threshold) will be treated as a deposit for insurance purposes. Funds having been swept to the Fed Funds account, as reflected on the institution's end-of-day records, will be treated as other similarly situated Fed Funds liabilities. Upon an institution's failure, amounts in a Fed Funds account in a failed institution generally are treated as unsecured, non-deposit liabilities and are not eligible for insurance or depositor preference status.

*Holding company commercial paper sweep account.* Under this arrangement the investment decision on funds to be swept from a customer's account typically is made after the day's transactions are posted against the deposit account, usually in the late evening or early the following morning. The customer's funds in excess of the pre-established threshold are swept out of the deposit account to a general ledger account on the depository institution's books. The depository institution, acting as agent for its holding company, will book the commercial paper on the holding company's books. The treatment of the swept funds in the event of failure will depend on the ownership of the general ledger account into which the funds are swept. If the general ledger account is held for the benefit of the sweep customers, then a purchase of commercial paper will not have been completed. Thus, the swept funds will be treated as if they had not left the deposit account. If the general ledger account is owned solely by the holding company, then a purchase of commercial paper will have been completed. Thus, the swept funds will be treated as having purchased the holding company commercial paper.

If the swept funds have purchased the holding company commercial paper, in the event of the depository institution's failure the ability of the sweep customer to redeem the commercial paper the day following failure will depend upon a number of factors, including the holding company's liquidity position and

<sup>11</sup> Deposits owned by a mutual fund are insured under the FDIC's insurance rules as funds owned by a corporation. 12 CFR 330.11.

whether it enters bankruptcy. In a purchase and assumption transaction, the FDIC as receiver normally will seek to recover the swept funds, but the ability of the sweep customer to access these funds, and the ultimate recovery of these funds, may depend on factors outside the control of the receivership. In the event of a payoff, the sweep customer's recovery of swept funds will likewise be limited by the same factors outside the control of the receivership.

**Loan sweep account.** A loan sweep account uses a customer's excess deposit balances to automatically pay down a loan or other credit account balance at the depository institution. This is another example of an internal sweep transaction. In this case excess balances in a customer's deposit account, above a pre-established threshold, are swept out of the deposit account and used to pay down a loan at the depository institution. In the event of failure this transaction will be completed prior to determining end-of-day deposit and account balances. Thus, the funds will have been swept out of the deposit account and used to reduce the loan balance. For insurance purposes the FDIC would treat the funds residing in the deposit account, those below the pre-established threshold, as a deposit account.

#### Disclosure Requirements

The interim rule imposed certain disclosure requirements in connection with sweep accounts, effective July 1, 2009. In particular, institutions must prominently disclose in all sweep account contracts and account statements reflecting sweep account balances whether swept funds are *deposits* (as defined in 12 U.S.C. 1813(l)). If the funds are not deposits, the institution must further disclose the status such funds would have if the institution failed. In addition, the interim rule required that the disclosures be consistent with how the institution reports such funds on its Call Reports or Thrift Financial Reports. In issuing the interim rule, the FDIC asked for comments on specific issues associated with the sweep account disclosure requirements.<sup>12</sup>

As discussed below, based on comments received, the final rule reflects modifications to the disclosure

requirements in the interim rule. Under the final rule, effective July 1, 2009, institutions must prominently disclose in writing to sweep account customers whether their swept funds are deposits within the meaning of 12 U.S.C. 1813(l): (1) Within sixty days after July 1, 2009, and no less than annually thereafter, (2) in all new sweep account contracts, and (3) in renewals of existing sweep account contracts. If the funds are not deposits, the institution must further disclose the status such funds would have if the institution failed—for example, general creditor status or secured creditor status. Such disclosures must be consistent with how the institution reports such funds on its Call Reports or Thrift Financial Reports. The disclosure requirements do not apply to sweep accounts where: The transfers are within a single account, or a sub-account; or the sweep account involves only deposit-to-deposit sweeps, such as zero-balance accounts, unless the sweep results in a change in the customer's insurance coverage.

As noted in the comment summary, the three industry trade associations that commented on this issue agreed with the FDIC's intent to have institutions provide clear disclosures to sweep account customers. In response to the comment that institutions already provide adequate disclosures to sweep account customers, the FDIC notes that under the final rule (as under the interim rule) no change to such preexisting disclosures would be required as long as they indicate: (1) Whether the swept funds are *deposits*; and (2) if the swept funds are not deposits, how they would be treated if the institution should fail.

Several commenters asked for greater clarity regarding which sweep products would be subject to the disclosure requirement. Under the final rule a sweep account involves the *pre-arranged* transfer of funds from a deposit account to: (1) An investment vehicle located *outside* the depository institution, or (2) another account or investment vehicle located *within* the depository institution. The transaction must be pre-arranged according to the terms of the account agreement which specifies rules governing the automated transfer of funds out of and into the deposit account. Further, the funds must be transferred from a deposit account to an account or investment vehicle, either located within or outside the depository institution. Under the final rule, the disclosure requirements do not apply to arrangements where the customer initiates transfers through instructions provided to the depository institution, which could be on a daily

basis, to move funds from a deposit account to another account or investment vehicle. The disclosure rules also do not apply to arrangements where transfers are within a single account (to a sub-account), such as may be the case with retail or reserve sweeps. In addition, the disclosure rules do not apply to other deposit-to-deposit sweeps, such as ZBAs, unless the sweep results in a change in the customer's insurance coverage. In the deposit-to-deposit sweep arrangements of which the FDIC is aware, the sweep does not change the insurance coverage available to the customer.

The FDIC agrees with the commenters who stated that the disclosure requirements should not be overly prescriptive and, specifically, should not require that specific language be included in the disclosures. Hence, the final rule does not impose specific disclosure language, allowing institutions to fashion their own disclosures, as long as they satisfy the disclosure requirements.

Despite the comment that the disclosures should be required to be provided just one time to sweep account customers, the FDIC continues to believe that, in order for the disclosure requirements to be meaningful and effective, they must be provided at the initiation of a new sweep account agreement between the institution and the customer, in all agreement renewals and on a periodic basis, but not less than annually.

The FDIC agrees with the trade association that suggested flexibility in communicating the disclosure requirements to sweep customers. Hence, in complying with the final rule, institutions need not modify their existing contracts with sweep customers, but the disclosures should be made in all new agreements and agreement renewals. Also, an institution may comply with the requirement for the initial and periodic disclosures through, for example, client letters, transaction confirmation statements or account statements. The requirement in the interim rule that such disclosures be provided in account statements, therefore, is not part of the final rule.

The FDIC agrees with the comments that the potential, under the final rule, for the FDIC using the FDIC Cutoff Point (instead of the institution's ordinary cutoff point) upon the institution failure complicates the disclosure requirements. As discussed above, for *internal* sweep arrangements, it would not matter whether the FDIC uses the institution's ordinary cutoff point or an FDIC Cutoff Point, the sweep would still be completed as of the failure date; thus,

<sup>12</sup> Specifically, the FDIC asked for information on what disclosures are currently made in connection with sweep account arrangements which allow sweep customers to ascertain the treatment of such funds if the institution should fail? Also, what form the disclosures take, when they are provided and what is their frequency? In addition, the FDIC asked if the disclosures are consistent with how such funds are reported in Call and Thrift Financial Reports.



the status of the swept funds would be the same under either cutoff point. For external sweep arrangements (for example, external money market mutual fund sweeps), the required disclosures should indicate the possibility that, if the institution should fail, the applicable funds might not be swept to the source outside the institution and should indicate how the funds would be treated in that situation—for example, they would be treated as deposits and insured under the applicable insurance rules and limits.

As to the question raised in the comments about this issue, the final rule does not require institutions to disclose to customers the possibility that the FDIC would impose provisional holds on their deposits if the institution should fail.

### VIII. Plain Language

Section 722 of the Gramm-Leach-Bliley Act, Public Law 106-102, 113 Stat. 1338, 1471 (Nov. 12, 1999), requires the Federal banking agencies to use plain language in all proposed and final rules published after January 1, 2000. No commenters suggested that the interim rule was unclear, and the final rule is substantively similar to the interim rule.

### IX. Paperwork Reduction Act

*OMB Number:* New Collection.

*Frequency of Response:* On occasion.

*Affected Public:* Insured depository institutions offering sweep account products.

*Estimated Number of Respondents:* 1,170 to 1,970.

*Estimated Time per Response:* 25–43 hours per respondent.

*Estimated Total Annual Burden:* 28,870–84,400 hours.

*Background/General Description of Collection:* The final rule contains a collection of information pursuant to the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*) (“PRA”). In particular, the final rule requires, subject to a delayed effective date, depository institutions offering sweep products to disclose whether the swept funds are deposits for insurance purposes and, if not, how these funds would be treated in the event of failure. In accordance with the requirements of the Paperwork Reduction Act of 1995, the FDIC may not conduct or sponsor, and respondents are not required to respond to, an information collection unless it displays a currently valid Office of Management and Budget (“OMB”) control number. The FDIC submitted the information collection contained in this rule to OMB for review. No collection of

information will be made until OMB approval has been obtained.

*Estimated costs:* Compliance with the disclosure requirement will require insured depository institutions offering sweep products, which do not currently provide adequate disclosures, to modify their sweep account documentation to include new language indicating whether swept funds are a deposit for insurance purposes and, if not, how such funds would be treated in the event of failure. Further, additional documentation may be provided to sweep customers as part of a statement or other mailing. Implementation cost will be mitigated by the delayed effective date of this requirement. Sweep account documents must be reprinted periodically in any case, and the cost of including the disclosure requirement should be minimal. Further, most insured depository institutions already make certain disclosures to customers, and the new requirements would simply replace or supplement these disclosures. After implementation, on-going cost should be negligible. Future printings of sweep account documentation will have to be conducted in any case to replenish stock, and the disclosure requirement should not add to the cost of such printings given its brief nature. Customer account statements would continue to be provided according to normal business practices. Further, staff training must be conducted periodically, and the disclosure requirement should not materially add to the length or complexity of this training.

The exact number of insured depository institutions offering sweep products is unknown. It is the FDIC’s experience that the vast majority of large institutions offer some sweep arrangement as part of their cash management services. The prevalence of sweep offerings among smaller community banks is far less prevalent. The FDIC’s analysis assumes that all insured depository institutions with total assets of at least \$2 billion offer at least one sweep product (370 institutions). It is further assumed that between 10 and 20 percent of the remaining 8,000 insured institutions also offer a sweep product (800 to 1,600 institutions). The total number of respondents is estimated to be between 1,170 and 1,970. The FDIC estimates that the hourly burden will range from 25 hours per institution to 43 hours per institution. The total hours are estimated to be from 28,870 hours to 84,400 hours.

### Request for Comment

*Comments are invited on:* (a) Whether the collection of information is necessary for the proper performance of the FDIC’s functions, including whether the information has practical utility; (b) the accuracy of the estimates of the burden of the information collection, including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the information collection on respondents, including through the use of automated collection techniques or other forms of information technology. All comments will become a matter of public record.

**ADDRESSES:** Interested parties are invited to submit written comments to the FDIC concerning the Paperwork Reduction Act implications of this proposal. Such comments should refer to “Processing of Deposit Accounts, 3064–AD26,” in the subject line of the message. Comments may be submitted by any of the following methods:

- *Agency Web Site:* <http://www.FDIC.gov/regulations/laws/federal>. Follow instructions for submitting comments on the agency Web site.

- *E-mail:* [comments@FDIC.gov](mailto:comments@FDIC.gov). Include “Processing of Deposit Accounts,” 3064–AD26” in the subject line of the message.

- *Mail:* Executive Secretary, Attention: Comments, FDIC, 550 17th St., NW., Room F–1066, Washington, DC 20429.

- *Hand Delivery/Courier:* Comments may be hand-delivered to the guard station at the rear of the 550 17th Street Building (located on F Street), on business days between 7 a.m. and 5 p.m. (EST).

- A copy of the comments may also be submitted to the OMB desk officer for the FDIC, Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Room 3208, Washington, DC 20503.

*Public Inspection:* All comments received will be posted without change to <http://www.fdic.gov/regulations/laws/federal> including any personal information provided.

### X. Regulatory Flexibility Act

The Regulatory Flexibility Act (“RFA”) requires a federal agency publishing a notice of proposed rulemaking to prepare and make available for public comment an initial regulatory flexibility analysis that describes the impact of the proposed rule on small entities. 5 U.S.C. 603(a).

As defined in regulations issued by the Small Business Administration (13 CFR 121.201), a "small entity" includes a bank holding company, commercial bank or savings association with assets of \$165 million or less (collectively, small banking organizations). The RFA provides that an agency is not required to prepare and publish a regulatory flexibility analysis if the agency certifies that the proposed rule would not have a significant impact on a substantial number of small entities. 5 U.S.C. 605(b).

In publishing the interim rule the FDIC certified that the interim rule would not have a significant economic impact on a substantial number of small entities. The rationale for this certification was that the interim rule would establish the FDIC's practice for determining deposit account balances at a failed insured depository institution and would impose no requirements on insured depository institutions.

The final rule imposes a disclosure requirement on all insured depository institutions offering one or more sweep account products. This requirement is subject to a delayed effective date. The FDIC believes the disclosure requirement in the final rule will not have a substantial impact on a substantial number of small banking organizations, mainly because such entities are much less likely than larger insured depository institutions to offer sweep account products. Such products are typically offered by insured depository institutions serving large commercial and institutional customers. The FDIC received no comments on whether and, if so, to what extent small banking organizations will be affected by the disclosure requirement in the final rule.

#### **XI. The Treasury and General Government Appropriations Act, 1999—Assessment of Federal Regulations and Policies on Families**

The FDIC has determined that the final rule will not affect family well-being within the meaning of section 654 of the Treasury and General Government Appropriations Act, enacted as part of the Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999 (Pub. L. 105-277, 112 Stat. 2681).

#### **List of Subjects in 12 CFR Part 360**

Banks, Banking, Savings associations.

■ For the reasons stated above, the Board of Directors of the Federal Deposit Insurance Corporation hereby amends part 360 of title 12 of the Code of Federal Regulations as follows:

#### **PART 360—RESOLUTION AND RECEIVERSHIP RULES**

■ 1. The authority citation for part 360 continues to read as follows:

**Authority:** 12 U.S.C. 1819(a) Tenth, 1821(d)(1), 1821(d)(10)(c), 1821(d)(11), 1821(e)(1), 1821(e)(8)(D)(i), 1823(c)(4), 1823(e)(2); Sec. 401(h), Public Law 101-73, 103 Stat. 357.

■ 2. Section 360.8 is revised to read as follows:

#### **§ 360.8 Method for determining deposit and other liability account balances at a failed insured depository institution.**

(a) *Purpose.* The purpose of this section is to describe the process the FDIC will use to determine deposit and other liability account balances for insurance coverage and receivership purposes at a failed insured depository institution.

(b) *Definitions*—(1) The *FDIC Cutoff Point* means the point in time the FDIC establishes after it has been appointed receiver of a failed insured depository institution and takes control of the failed institution.

(2) The *Applicable Cutoff Time* for a specific type of deposit account transaction means the *earlier* of either the failed institution's normal cutoff time for that specific type of transaction or the *FDIC Cutoff Point*.

(3) *Close-of-Business Account Balance* means the closing end-of-day ledger balance of a deposit or other liability account on the day of failure of an insured depository institution determined by using the *Applicable Cutoff Times*. This balance may be adjusted to reflect steps taken by the receiver to ensure that funds are not received by or removed from the institution after the *FDIC Cutoff Point*.

(4) A *sweep account* is an account held pursuant to a contract between an insured depository institution and its customer involving the pre-arranged, automated transfer of funds from a deposit account to either another account or investment vehicle located within the depository institution (*internal sweep account*), or an investment vehicle located outside the depository institution (*external sweep account*).

(c) *Principles*—(1) In making deposit insurance determinations and in determining the value and nature of claims against the receivership on the institution's date of failure, the FDIC, as insurer and receiver, will treat deposits and other liabilities of the failed institution according to the ownership and nature of the underlying obligations based on end-of-day ledger balances for each account using, except as expressly

provided otherwise in this section, the depository institution's normal posting procedures.

(2) In its role as receiver of a failed insured depository institution, in order to ensure the proper distribution of the failed institution's assets under the FDI Act (12 U.S.C. 1821(d)(11)) as of the FDIC Cutoff Point, the FDIC will use its best efforts to take all steps necessary to stop the generation, via transactions or transfers coming from or going outside the institution, of new liabilities or extinguishing existing liabilities for the depository institution.

(3) End-of-day ledger balances are subject to corrections for posted transactions that are inconsistent with the above principles.

(d) *Determining closing day balances*—(1) In determining account balances for insurance coverage and receivership purposes at a failed insured depository institution, the FDIC will use *Close-of-Business Account Balances*.

(2) A check posted to the *Close-of-Business Account Balance* but not collected by the depository institution will be included as part of the balance, subject to the correction of errors and omissions and adjustments for uncollectible items that the FDIC may make in its role as receiver of the failed depository institution.

(3) In determining *Close-of-Business Account Balances* involving sweep accounts:

(i) For internal sweep accounts, the FDIC will determine the ownership of the funds and the nature of the receivership claim based on the records established and maintained by the institution for that specific account or investment vehicle as of the closing day end-of-day ledger balance. (For example, if a sweep account entails the daily transfer of funds from a demand deposit account to a Eurodollar account at a foreign branch of the insured depository institution, if the institution should fail on that day, the FDIC would treat the funds swept to the Eurodollar account, as reflected on the institution's end-of-day records, as an unsecured general creditor's claim against the receivership.);

(ii) For external sweep accounts, the FDIC will treat swept funds consistent with their status in the end-of-day ledger balances of the depository institution and the external entity, as long as the transfer of funds is completed prior to the *Applicable Cutoff Time*. (For example, if funds held in connection with a money market sweep account are wired from a customer's deposit account at the insured depository institution to the mutual fund prior to the *Applicable*

Cutoff Time, if the institution should fail on that day, the FDIC would recognize that sweep transaction as completed for claims and receivership purposes.);

(iii) For repurchase agreement sweep accounts, where, as a result of the sweep transaction, the customer becomes either the legal owner of identified assets subject to repurchase or obtains a perfected security interest in those assets, the FDIC will recognize, for receivership purposes, the customer's ownership interest or security interest in the assets.

(4) For deposit insurance and receivership purposes in connection with the failure of an insured depository institution, the FDIC will determine the rights of the depositor or other liability holder as of the point the *Close-of-Business Account Balance* is calculated.

(e) *Disclosure requirements.* Beginning July 1, 2009, in all new sweep account contracts, in renewals of existing sweep account contracts and within sixty days after July 1, 2009, and no less than annually thereafter, institutions must prominently disclose in writing to sweep account customers whether their swept funds are deposits within the meaning of 12 U.S.C. 1813(l). If the funds are not deposits, the institution must further disclose the status such funds would have if the institution failed—for example, general creditor status or secured creditor status. Such disclosures must be consistent with how the institution reports such funds on its quarterly Consolidated Reports of Condition and Income or Thrift Financial Reports. The disclosure requirements imposed under this provision do not apply to sweep accounts where: The transfers are within a single account, or a sub-account; or the sweep account involves only deposit-to-deposit sweeps, such as zero-balance accounts, unless the sweep results in a change in the customer's insurance coverage.

By order of the Board of Directors.

Dated at Washington, DC, this 27th day of January, 2009.

Federal Deposit Insurance Corporation.

**Robert E. Feldman,**

*Executive Secretary.*

[FR Doc. E9-2113 Filed 1-30-09; 8:45 am]

**BILLING CODE 6714-01-P**

## **SOCIAL SECURITY ADMINISTRATION**

### **20 CFR Part 404**

[Docket No. SSA-2008-0070]

RIN 0960-AG93

#### **Expiration Date Extension for Musculoskeletal Body System Listings**

**AGENCY:** Social Security Administration.

**ACTION:** Final rule.

**SUMMARY:** This final rule extends for 2 years the date on which the Musculoskeletal System Listing of Impairments will no longer be effective. We use the body system listings at the third step of the sequential evaluation process when we evaluate your claim for benefits based on disability under title II and title XVI of the Social Security Act. Other than extending the effective date of the listings, we have not revised the musculoskeletal listings. This extension will ensure that we continue to have the medical evaluation criteria in the listings to adjudicate disability claims involving disorders of the musculoskeletal body system at the third step of the sequential evaluation process.

**DATES:** This final rule is effective on February 2, 2009.

**FOR FURTHER INFORMATION CONTACT:** Cheryl A. Williams, Acting Director, Office of Medical Listings Improvements, 6401 Security Boulevard, Baltimore, MD 21235-6401. Call (410) 966-4163 for further information about this final rule. For information on eligibility or filing for benefits, call our national toll-free number, 1-800-772-1213 or TTY 1-800-325-0778, or visit our Internet site, Social Security Online, at <http://www.socialsecurity.gov>.

#### **SUPPLEMENTARY INFORMATION:**

##### **Electronic Version**

The electronic file of this document is available on the date of publication in the **Federal Register** at <http://www.gpoaccess.gov/fr/index.html>.

##### **Background**

We use the Listing of Impairments (the listings) at the third step of the sequential evaluation process to evaluate claims filed by adults and children for benefits based on disability under the title II and title XVI programs. We divide the listings into two parts: Part A for adults and part B for children. If you are age 18 or over, we apply the listings in part A when we assess your claim. If you are under age 18, we first use the criteria in part B of the listings.

If the criteria in part B do not apply, we may use the criteria in part A when those criteria give appropriate consideration to the effects of the impairment(s) in children. (See §§ 404.1525 and 416.925.)

#### **Explanation of Changes**

In this final rule, we are extending until February 18, 2011, the date on which the Musculoskeletal System (1.00 and 101.00) listings will no longer be effective. We periodically review and update the listings in light of medical advances in disability evaluation and treatment and our program experience. We last updated the medical criteria for the Musculoskeletal System listings on November 19, 2001. 66 FR 58010. While we intend to publish proposed and final rules to update the Musculoskeletal System listings as quickly as possible, we cannot publish final rules revising these listings by February 19, 2009, the current expiration date.

#### **Regulatory Procedures**

##### *Justification for Final Rule*

We follow the Administrative Procedure Act (APA) rulemaking procedures specified in 5 U.S.C. 553 when developing regulations. 42 U.S.C. 902(a)(5). The APA provides exceptions to its notice and public comment procedures when an agency finds there is good cause for dispensing with such procedures on the basis that they are impracticable, unnecessary, or contrary to the public interest. We have determined that, under 5 U.S.C. 553(b)(B), good cause exists for dispensing with the notice and public comment procedures for this rule. Good cause exists because this final rule only extends the date on which the musculoskeletal body system listings will no longer be effective. It makes no substantive changes to the listings. The current regulations expressly provide that we may extend, revise, or re-promulgate the listings. Therefore, we have determined that opportunity for prior comment is unnecessary, and we are issuing this regulation as a final rule.

In addition, we find good cause for dispensing with the 30-day delay in the effective date of a substantive rule provided by 5 U.S.C. 553(d)(3). As explained above, we are not making any substantive changes in the body system listings. Without an extension of the expiration dates for these listings, we will lack the medical evaluation criteria needed for assessing impairments in this body system at the third step of the sequential evaluation process. In order to ensure that we continue to have these listings in our rules, we find that it is